No. 84-142

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1984

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

vs.

UNITED STATES CURRENCY AMOUNTING TO THE SUM OF TWO HUNDRED FIFTY THOUSAND DOLLARS [$250,000.00] MORE OR LESS,

Defendant,

and

THE STATE OF NEW YORK,

Defendant-Appellee,

and

REPUBLIC OF COLOMBIA,

Defendant-Appellee-Petitioner,

and

JOSE A. FONSECA,

Defendant-Appellant-Respondent.

MEMORANDUM IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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August 27, 1984

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Preliminary Statement

Colombia's certiorari petition is baseless and should be summarily denied by the Court. Accordingly, respondent respectfully submits this short form memorandum in opposition to Colombia's petition.

Short Form Argument in Opposition to Certiorari

The argument that the Court of Appeals has "closed" the United States Courts to Colombia is frivolous. The carefully

worded Court of Appeals opinion *expressly permits Colombia* to "seek whatever redress it believes appropriate in the proper forum" and *disapproves only the misuse and abuse of federal discovery procedures:* " . . . Columbia . . . may not seek to develop the facts it needs to prove its case by use of *discovery* in the Courts of the United States." Petition at A-11 (emphasis added). This language is especially precise, narrow and clear in the context in which it appears, *i.e.*, the opinion read as a whole and with reference to *United States v. Dunbar*, 502 F.2d 506 (5th Cir. 1974).

Underscoring the frivolousness of Colombia's arguments in this regard is its July 20, 1984 *motion to intervene in Fonseca's mandamus action, Fonseca v. Regan*, 78 C 1907 (E.D.N.Y.), now once again pending before the District Court on remand from the Court of Appeals. *See*, Petition at 8, n.5. The conclusion is inescapable that even Colombia itself does not believe its own argument that the Court of Appeals has "closed" the United States Courts to it. Moreover, the *remand* of the related mandamus action (consolidated on appeal to the Court of Appeals with the interpleader action in which Colombia presently seeks certiorari), together with Colombia's pending motion to intervene in that action, make it clear that review by this Court (even if otherwise justified, which it is not) is *premature* and should await the final determination of Colombia's intervention motion and the mandamus action. *See, Andrews v. United States*, 373 U.S. 334, 340 (1963); *Republic Natural Gas Co. v. Oklahoma*, 334 U.S. 62, 72 (1948); *Collins v. Miller*, 252 U.S. 364, 370-71 (1920).

Likewise totally devoid of merit is Colombia's argument that the Court of Appeals disregarded treaty obligations between the United States and Colombia. To the contrary, while the Court of Appeals was careful to expressly acknowledge that "Colombia may have a valid action against Fonseca [in a proper forum] for exporting currency in violation of its currency exchange laws", it correctly characterized Colombia's treaty claims as having "no merit". Petition at A-10, A-11. Article VII, Section 2, of the IMF Articles of Agreement (the

Bretton Woods Agreement), upon which Colombia relies (Petition at 3), applies *only* to "*Exchange contracts* which involve the currency of any member and which are contrary to the exchange control regulations of that member . . . " (emphasis added). There is, however, simply *no* "exchange contract" involved in this case, nor has any court or commentator ever suggested (as Colombia nevertheless here contends *ipse dixit*) that a *baggage claim check** constitutes an "exchange contract" within the meaning of the Bretton Woods Agreement.

Colombia's arguments vis-a-vis the abusive interpleader and discovery practice by the United States and Colombia in the District Court, strongly disapproved of by the Court of Appeals, are equally baseless. The Court of Appeals determination in these regards is squarely and uniformly supported by a long line of lower federal appellate and district court decisions. *See, Dunbar v. United States*, 502 F.2d 506 (5th Cir. 1974); *see, also, United States v. One Residence, etc.*, 603 F.2d 1231, 1234 (7th Cir. 1979), *United States v. Palmer*, 565 F.2d 1063, 1065 (9th Cir. 1977), *Ferris v. United States*, 511 F.Supp. 795, 797 (D. Nev. 1981), *Ferris v. United States*,

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* Colombia's claim that the record does not contain a copy of the baggage claim check was properly rejected by the Court of Appeals. It has never been disputed that respondent presented the proper claim check stub and accurately described the suitcase and its contents. Petition at A-9. Moreover, page 130a of the Joint Appendix plainly displays a copy of respondent's "Passenger Ticket and *Baggage Check*" (emphasis added).

Furthermore, Colombia's marginal assertion that respondent relies on the "enforceability" of the "Fonseca/Avianca contract", Petition at 5, n. 2, is inaccurate at best. Colombia's reference is to respondent's analysis below of *Colombia's* claim-in-interpleader, *not* to a statement of the basis for *respondent's* claim, which was summarized in his main Court of Appeals brief, at 17, as follows: "the combination of Fonseca's baggage claim check, his sworn affidavit, and his compliance with all applicable Customs regulations."

501 F.Supp. 98, 101 (D. Nev. 1980), *United States v. Ortega*, 450 F.Supp. 211, 212 (S.D.N.Y. 1978). Colombia cannot avoid application of these precedents to it, especially in light of the explicit requirement of the Treaty of Peace, Amity, Navigation and Commerce between the United States and Colombia (December 12, 1846, United States-Colombia, 9 Stat. 881, T.S. No. 54, 6 Bevans 868) that Colombia may seek recourse in the Courts of the United States only "on the same terms which are usual and customary with the natives or citizens of the country." (Petition at 2.)

CONCLUSION

Colombia's certiorari petition, seeking discretionary review of the well-reasoned opinion of the Court of Appeals in this case (which adopted and applied the rule of *Dunbar v. United States, supra*, to this case), is meritless and should be summarily denied by the Court. Moreover, and in any event, the petition is premature in light of the remand of the related mandamus action and Colombia's pending motion to intervene in that action.

WHEREFORE, respondent respectfully urges the Court to deny the petition of the Republic of Colombia for a Writ of Certiorari in this case.

Respectfully submitted,

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